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No. 281

In The Supreme Court of the United States

OCTOBER TERM 1953

STATE OF TEXAS *et al.*,
Petitioners,

VERSUS

STATE OF WISCONSIN *et al.*,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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DECEMBER, 1953.

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STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; AND STATE OF NEW MEXICO AND OIL CONSERVATION COMMISSION OF NEW MEXICO,

Petitioners,

VERSUS

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF MILWAUKEE, WISCONSIN; COUNTY OF WAYNE, MICHIGAN; AND THE FEDERAL POWER COMMISSION,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners, interveners in the court below, pray that this Court grant a rehearing of its order of November 30,

1953, denying the Petition for Writ of Certiorari filed herein on August 20, 1953, and further pray that upon rehearing a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case as prayed for in the Petition.

REASONS FOR GRANTING A REHEARING AND ISSUING THE WRIT

I.

The question presented is one of utmost and immediate importance to petitioners and to all other States in which oil and gas are produced, as well as to producers and gatherers, and to the consumers of gas. Regarding the investigation instituted by the Federal Power Commission against Phillips Petroleum Company as a test case that would determine whether Federal authority would be extended to sales of gas to interstate pipe lines by independent producers and gatherers, and believing that such extension of Federal authority would seriously interfere and conflict with petitioners' regulation of production and gathering, petitioners severally intervened before the Federal Power Commission and again before the Court of Appeals, and opposed such extension of authority. Other producing States likewise intervened before the Federal Power Commission and opposed regulation of independent producers and gatherers, but were not allowed to present evidence because none of the gas

immediately involved in the proceeding was produced in those States (R. 1686-1687). The widespread interest and concern of the producing States in the question presented is evidenced by the resolution adopted at the quarterly business meeting of the Interstate Oil Compact Commission,[1] composed of 26 producing States, on December 5, 1951, after the denial of certiorari by this Court. The full text of the resolution is quoted below:

"WHEREAS, it has come to the attention of the Commission that a Decree has been entered by a two to one decision of the Court of Appeals for the District of Columbia Circuit which has held that the jurisdiction of the Federal Power Commission, under the terms of the Natural Gas Act, extends to sales of natural gas by producers and gatherers, overruling a previous holding by the Federal Power Commission itself that it did not have such jurisdiction.

"WHEREAS, it is the opinion of this Commission that extension of such jurisdiction permitting partial regulation of the production and gathering of natural gas will, as the Federal Power Commission found and stated as a fact, substantially interfere with state regulation of production and gathering of natural gas;

"WHEREAS, the power to regulate and control natural resources traditionally rests in the several states; which power with respect to oil and gas was affirmed by the Congress in the Act establishing the Interstate Oil Compact Commission; and with re-

[1] Interstate Oil Compact Commission is an organization composed of those producing States whose Legislatures have approved the signing on behalf of the State of the Interstate Compact to conserve oil and gas. Consent of Congress to the Compact has been obtained and renewed from time to time. The consent of Congress, presently extends to four years from September 1, 1951. Public Law 128, Chapter 350, 82nd Congress, First Session (65 Stat. 199).

spect to natural gas was reaffirmed by the Congress in the Natural Gas Act;

"WHEREAS, in the opinion of this Commission, partial regulation by a federal agency in this field can only lead to one of two results:

(a) Hopeless confusion, conflicts and undue and unjust burdens on the operators, producers and gatherers; or

(b) Ultimate complete federal regulation in the oil and gas field.

"WHEREAS, it is the opinion of this Commission that the production of natural gas and the production of oil are so closely allied and associated that federal regulation of the production of natural gas would inevitably result in regulation of the production of oil by the same authority.

"NOW, THEREFORE, BE IT RESOLVED by the Interstate Oil Compact Commission in business session convened at Oklahoma City, Oklahoma, this 5th day of December, 1953, that the Commission do now call the seriousness of the situation to the attention of its member states and urge them to take every step possible to secure the reversal of the aforesaid Decree."

II.

Believing that the language of the decision of the Court of Appeals for the Fifth Circuit in the *Interstate case*, 156 F. 2d 949, threatened an extension of Federal authority over sales by independent producers and gatherers to interstate pipe lines, two of the three petitioners here—the States of Texas and Oklahoma—filed briefs *amici curiae* and presented oral argument before this

Court upon review of that decision 331 U.S. 682. Counsel for the Federal Power Commission, both in their brief and in oral argument, distinguished sales made by a natural gas company such as Interstate from sales by independent producers and gatherers and denied that regulation of Interstate's sales would result in extension of Federal regulatory authority to sales by independent producers and gatherers. This Court recognized the distinction and reserved for future consideration the question here presented when it said (331 U.S. 682, 690, 691, footnote 18):

> "The Federal Power Commission has not asserted jurisdiction over all sales taking place in the natural gas fields even though in interstate commerce for resale for ultimate public consumption. In the Matter of Columbian Fuel Corp., 2 F.P.C. 200; In the Matter of Billings Co., 2 F.P.C. 288. We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases."[2]

Moreover, in laying down the rule concerning the authority of the Federal Power Commission over sales by a natural gas company, such as Interstate, made during the course of production and gathering, this Court said that if proof were made that Federal regulation of such sales would be inconsistent or interfere with State

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[2] The *Columbian Fuel case* was the first decision by the Federal Power Commission holding that it had no jurisdiction over sales for resale in interstate commerce by independent producers and gatherers.

regulatory authority, jurisdiction of the Federal Power Commission does not attach 311 U.S. 682, 690.[3]

Petitioners made ample proof of the conflict and interference with State regulation of production and gathering that would result from Federal regulation of sales such as Phillips. The Federal Power Commission so found and predicated its decision in part upon that finding (R. 1745-1747).

The Court of Appeals disregarded the finding, upon the ground that Phillips' sales were not made "during the course of" production and gathering, and therefore it said the rule laid down by this Court in the *Interstate case* does not apply (R. 1863). In so holding, the Court of Appeals disregarded the finding of fact by the Commission that such sales were made during the course of production and gathering (R. 1745). Apparently the Court was of the opinion that sales made immediately upon completion of production and gathering are not made "during the course of" those functions within the meaning of this Court's language in the *Interstate case.* By so holding, the Court of Appeals rendered meaningless, for all practical purposes, the language of this Court in the *Interstate case,* because most all field sales are made immediately upon completion of production or gathering and rarely, if ever, in the midst of one of those func-

[3] There was no such proof in the *Interstate case.* On the contrary, the Louisiana Public Service Commission participated in the proceedings and did not oppose Federal regulation, a fact which this Court took particular note of in its opinion (331 U.S. at p. 691).

tions. The Court went on to say in effect that it would make no difference if the sales were made during the course of production and gathering because "federal protection against exhorbitant rates is not inconsistent with the exercise by the producing states of its regulatory functions. *Interstate Natural Gas case,* * * *" (R. 1863-1864).

No support is to be found in the *Interstate case* for that statement—quite the contrary. The question of "exhorbitant" rates is of course injected by the Court of Appeals, there being no evidence on the point, but, aside from that, it can hardly be supposed that Federal Power Commission jurisdiction attaches when it finds that rates are exhorbitant and that it is without jurisdiction when it finds they are not!

Petitioners are therefore greatly confused in respect to the proof required of conflict between Federal and State authority to meet the test laid down by this Court in the *Interstate case.* It is respectfully submitted that the Court of Appeals has in effect overruled this Court's pronouncement in that regard. This Court alone can make clear what was intended.

This Court again reserved decision of the question here presented when it upheld the validity of the Oklahoma minimum price for gas produced in the Oklahoma Hugoton Field, when it said *(Cities Service Gas Co. v. Peerless Oil & Gas Co.,* 340 U.S. 179, 188-189):

"Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states, is not before this Court."

Presumably this Court refrained from deciding this important question until it had before it a case in which the issue was squarely presented on the facts of the case. This is such a case, and this Court should settle this important question now.

The decision of the Court of Appeals even with the denial of certiorari by this Court,[4] settled nothing, but the decision being of a divided court, in addition to being vague and vascillating as to the basis for its conclusion, seems only to heighten the doubt and confusion.

The decision in this case is "fundamental to the further conduct of the case" and should be reviewed by this Court at this time.[5] The facts in respect to jurisdiction have been fully developed and a complete record made and nothing is to be gained by remanding the case for an expensive and laborious rate hearing which will shed no light on the jurisdiction of the Commission. Moreover, the delay involved in such a proceeding before this case may be again in shape to review by this Court will cause serious economic loss to the producers and gatherers of gas, to the revenues of producing States, and

[4] *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912; *Agaston* v. *Penn.*, 340 U.S. 844.

[5] *United States* v. *General Motors Corp.*, 323 U.S. 373, 377; *Land* v. *Dollar*, 330 U.S. 730, 734, foonote 2; *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 685, footnote 3.

to the regulatory authorities of those States over production and gathering, and will curtail and restrict the supply of gas to interstate markets.

III.

Even before this proceeding began, petitioners had experienced difficulty in obtaining compliance with their conservation orders because of producers' fears and compliance might result in their becoming natural gas companies (R. 418, 472-473). Many producers were refusing to sell gas in interstate commerce.[6] Particularly had this difficulty been pronounced when petitioner Railroad Commission of Texas sought to obtain short-term interconnections of lines for proration purposes (R. 472) or the saving of casinghead gas then being flared (R. 418).

The decision of the Court of Appeals and the refusal of this Court to review it will inevitably accentuate the reluctance of producers to sell gas to interstate pipe lines, or to make further expenditures for the discovery and production of gas, or for the conservation of gas. Not only will this result in inferior uses and physical waste of natural gas, contrary to the conservation policies of the producing States, but it will retard the expansion of pipe line facilities to serve the ever increasing demand for

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[6] Comment, 59 Yale Law Journal, 1468, 1490 (1950); Natural Gas Investigation, Federal Power Commission, Docket No. G-580, Report of Commissioners Smith and Wimberly, U. S. Government Printing Office, p. 170 (1948).

natural gas, and may actually reduce supplies of gas for pipe lines already in operation. Consumers in distant States may not be the least to suffer. The economy of the entire nation will be adversely affected by a further postponement of a definitive decision by this Court.

Independent producers and gatherers will be even more reluctant now to comply with many of petitioners' conservation orders. For petitioners' orders do not and cannot take into consideration, and still operate effectively, whether the use to which the gas is sought to be put is in intrastate or interstate commerce. Yet if compliance would necessitate a sale in interstate commerce for resale, the producer and gatherer might be faced with deciding whether the Court of Appeals' decision requires him to comply not only with petitioners' regulations but also with the mandatory requirements of the Natural Gas Act, such as the filing of tariffs,[7] the keeping of accounts in the prescribed manner[8] and making periodic reports[9] and the necessity of obtaining certificates of public convenience and necessity.[10]

These perplexing problems may well cause the less determined and the marginal operators to abandon their efforts and seek other fields of livelihood. The result would be both physical and economic waste.

[7] Natural Gas Act, Sec. 4(c), 15 U.S.C., § 717c(c).

[8] *Ibid.*, Sec. 8, 15 U.S.C., § 717g.

[9] *Ibid.*, Sec. 10, 15 U.S.C., § 717i.

[10] *Ibid.*, Sec. 7, 15 U.S.C., § 717f.

There is now pending in the Supreme Court of Oklahoma litigation testing the validity of a new minimum price order of the Oklahoma Corporation Commission affecting some of the same transactions that are involved in this case. *Natural Gas Pipeline Co. et al.* v. *Corporation Commission*, Nos. 35731, 35732 and 35734. In the promulgation of that order the State of Oklahoma has relied upon the holding of this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. Since in the latter case this Court expressly reserved the question presented in this case, the decision of the Court of Appeals herein, and this Court's denial of certiorari, create doubts as to the scope and effect of the *Cities Service decision* as applied to transactions of the kind involved in this case. Since the denial of certiorari in this case the State of Kansas has promulgated a new minimum price order whose validity turns upon the *Cities Service decision*.[11] See also *Northern Natural Gas Co.* v. *Federal Power Commission*, 206 F. 2d 690, a case involving an important question of the relationship between State and Federal regulatory power, in which the Court of Appeals for the Eighth Circuit cited and relied upon the decision of the Court of Appeals herein. Petitions for writs of certiorari to review that

[11] See Wall Street Journal, December 3, 1953, Page 12. Compare *Kansas-Nebraska Natural Gas Co.* v. *State Corporation Commission*, 170 Kan. 341, 225 P. 2d 1054 (1951).

decision are now pending in this Court. See Nos. 381, 382 and 469, this Term.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a Writ of Certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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